FILED
MAR 2 1989
JOSEPH F. SPANIOL,
CLERK

(13) (13)

Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.
Appellants,

v.

THE BEER INSTITUTE, et al.
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.
Appellants,

v.

THE BEER INSTITUTE, et al.
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE APPELLANTS WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of
the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER
Counsel of Record

66 Forest Street
Hartford, CT 06105
TELEPHONE: (203) 525-9191

DATED: February 28, 1989

16 pp

Printed by
Broccia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:	Page(s)
Bacchus Importers, Ltd. v. Dias, 468 U.S. 263 (1984)	2
Best Way Beer & Soda Distributors, Inc. v. N.Y. State Liquor Authority, 99 App. Div. 2d 727 (1984)	9
California v. LaReau, 409 U.S. 109 (1972)	1
Craig v. Boren, 429 U.S. 190 (1976)	2
Duran v. Salem, Inc., 422 U.S. 911 (1975)	1
Fisher Foods, Inc. v. Ohio Dept. of Liquor Control, 555 F. Supp. 641 (D. Ohio 1982)	3
Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976)	2
Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1984)	1
Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966)	8
New York State Liquor Authority v. Bilanca, 452 U.S. 714 (1981)	1
Schnapps Shops, Inc. v. H.W. Wright & Co., 377 F. Supp. 570 (D.C. Md. 1973)	7
State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936)	2
U.S. Brewers Assn. v. Director of New Mexico Dept. of Alco. Bev. Control, 1045 S. Ct. 1581 (1983)	3
United States Brewers Assn. v. Healy, 669 F. Supp. 543 (D. Conn. 1987)	2
Zifferin, Inc. v. Reeves, 308 U.S. 132 (1939)	1

TABLE OF AUTHORITIES (continued)

Constitutional Provisions and Statutes:	Page(s)
U.S. Const., Amend. XXI, Sec. 2	1
15 U.S.C.S. Section 113 (1985)	7
Conn. Gen. Stat. Section 30-63	3
Conn. Gen. Stat. Section 30-63b(b)	3
Conn. Gen. Stat. Section 30-63b(e)	4
N.Y. Alco. Bev. Cont. Law Section 55-b(2)	5, 9

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT EMPOWERS CONNECTICUT TO REGULATE THE PRICE OF LIQUOR WITHIN ITS BORDERS.

A. The Twenty-First Amendment Empowers Connecticut To Establish A Competitive Price For Beer Sold Within Its Borders.

Pursuant to the Twenty-First Amendment, Connecticut has the power to regulate all aspects of the sale of liquor within its borders. The mandate of the Twenty-First Amendment vesting authority to the states to regulate the trade in liquor is clear:

> ". . . the transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Constitution Amendment XXI, Section 2.

This Court has further interpreted the Twenty-First Amendment as conferring upon the states the broad power "to regulate the times, places and circumstances under which liquor may be sold." *New York State Liquor Authority v. Bilanca*, 452 U.S. 714 (1981); *See also Duran v. Salem, Inc.*, 422 U.S. 911 (1975); *Zifferin, Inc. v. Reeves*, 308 U.S. 132 (1939); *California v. LaReau*, 409 U.S. 109 (1972). Such broad language relative to "circumstances" certainly includes the power to regulate price.

Moreover, this Court has ruled that a state's powers pursuant to the Twenty-First Amendment reach so far as to sanction total prohibition of alcoholic liquor within a state. *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964). A state therefore acts within its constitutional powers in

enacting lesser degrees of regulation. *See Bacchus Importers, Ltd. v. Dias*, 468 U.S. 263, 284 (1984).

It is well-settled that the Twenty-First Amendment carves a unique exception to the normal Commerce Clause limitations on trade. Simply put, liquor is a unique commodity and not, as Appellees assert, the constitutional equivalent of other goods such as milk. *Craig v. Boren*, 429 U.S. 190 (1976); *United States Brewers Assn. v. Healy*, 669 F. Supp. 543, 599 (D. Conn. 1987); *See also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *State Board of Equalization v. Young's Market Company*, 299 U.S. 59, 62-63 (1936).

Despite the well-settled differences in the regulation of liquor as opposed to other goods, Appellees persist in promulgating an erroneous constitutional analysis relying on misplaced Commerce Clause arguments equating beer to milk. *See* Appellees Br. 17, 24-26. At issue in this appeal is the regulation of liquor, a commodity clearly distinguishable from all others by virtue of its regulation under State and Federal statutes and the Twenty-First Amendment to the Constitution. Appellees conclude their brief by asserting that the Twenty-First Amendment has no bearing on the constitutionality of the Connecticut statute. Appellees Br. 41. Presumptuous constitutional revisionism has no place in a brief before this Court. It is for Congress, and not the Appellees in this action, to repeal the Twenty-First Amendment. The Twenty-First Amendment cannot be ignored.

Pursuant to its Twenty-First Amendment powers, the State of Connecticut can determine equitable pricing for beer within its borders. The State, in exercising its constitutional authority, could establish and enforce arbitrary and excessive prices for beer each month, or for that matter artificially low prices without reference to the prevailing prices in other states. Appellees, as licensees exercising their prerogative to conduct

business in Connecticut, would be bound by any such unilateral pricing policies. *See Fisher Foods, Inc. v. Ohio Dept. of Liquor Control*, 555 F. Supp. 641 (D. Ohio 1982); *U.S. Brewers Assn. v. Director of New Mexico Dept. of Alco. Bev. Control*, 1045 S.Ct. 1581 (1983).

The Connecticut Affirmation Statute, however, requires that a competitive, not arbitrary, price be posted in Connecticut. The Connecticut statute insures this competitive and equitable pricing by *referencing* regional prices in its border states. Conn. Gen. Stat. Sections 30-63, 30-63b(b). Connecticut accomplishes this competitive parity by requiring Appellees to affirm that at the *moment* of posting prices in Connecticut, Connecticut wholesalers receive the lowest competitive price offered in a border state. Conn. Gen. Stat. Section 30-63b(b). To avoid arbitrary pricing, the Connecticut law ensures market pricing by requiring harmonization of its prices with those prices charged in border states.

Connecticut's method of referencing prices is analogous to banking institutions and employment agreements which reference the Federal Reserve or the Consumer Price Index in establishing interest rates and cost of living adjustments. Certainly Appellees would not suggest that referencing out-of-state prices constitutes regulation of out-of-state prices, any more than referring to the Federal Reserve or the Consumer Price Index constitutes regulation of the Federal Reserve or Consumer Price Index.

B. The Connecticut Statute Does Not Regulate The Price Of Beer Beyond Its Borders.

Connecticut cannot, and its affirmation statute does not, regulate the prices established by Appellees in other states. While Connecticut cannot tell the Brewers what price to post in other states, those states may, in exercising their legitimate Twenty-First Amendment authority, regulate the liquor trade and prices within their borders through their own regulations.

In fact, Connecticut General Statutes specifically recognize the Appellee's rights to change prices at any time in any other state:

> This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting. Conn. Gen. Stat. Section 30-63b(e).

Despite Connecticut's specific recognition of Appellees' authority to change prices in other states at any time, Appellees claim that the interaction of the Connecticut statute with border states' statutes constitutes an unconstitutional extraterritorial effect. Appellees Br. 18–23. It is not the Connecticut statute which prevents the Appellees' pricing flexibility, but rather the posting regulations of other states which arguably have adverse extraterritorial effects on the Connecticut statute.

The Commerce Clause does not grant private brewers and importers the right to make artificial and arbitrary pricing decisions relative to each of the fifty states. Regulation on a state-by-state basis has necessarily mandated the creation of fifty independent state "markets." Given that brewers and importers generally choose to operate by applying for licenses and/or selling to each state, there is no dispute that pricing decisions in one or more states may ultimately affect internal corporate decisions relative to pricing in other states. The Commerce Clause, however, does not operate to protect manufacturers or importers from making business or pricing decisions which must comport with each state's constitutionally mandated laws.

Appellees erroneously attribute Commerce Clause protection to pricing decisions allowing them to manipulate prices

in Connecticut and other states. The fact that Appellees may have to comport with state law in making pricing decisions in each of the fifty states is simply a function of the Twenty-First Amendment.

Should Appellees wish to restructure the national liquor distribution system, recourse to Congress in an attempt to rescind the Twenty-First Amendment may be the most appropriate course available. In any event, Appellees' claim that the Connecticut affirmation statute interferes with their ability to enforce arbitrary and artificial pricing decisions does not constitute sufficient grounds to overturn the statute.

II. THE CONNECTICUT AFFIRMATION STATUTE IS NOT PROTECTIONIST BECAUSE IT ENSURES COMPETITION AND ECONOMIC PARITY FOR BEER WHOLESALERS.

A. The Connecticut Statute Eliminates Appellees' Artificial And Arbitrary Pricing Of Beer In The State Of Connecticut.

In that the national liquor distribution system is composed of fifty independent state "markets," Appellees' claims that beer prices are determined by market forces are erroneous.

As a result of the creation of fifty artificial state "markets" and the establishment of statewide pricing regulations in most states, both the wholesale and retail price of beer may have very little to do with specific market conditions. The New York ABC Law, for example, legislates a 180-day statewide price to wholesalers, with any subsequent increases or decreases to be passed on uniformly. N.Y. Alco. Bev. Cont. Law Section 55-6 (McKinney 1987). Appellees' claims that prices in the Connecticut region will be distorted by the Connecticut affirmation law are erroneous insofar as beer prices are invariably *a priori* distorted by the creation of artificial

markets. As is the case in New York State, for example, posting statewide prices for 180 days with uniform increases and decreases only accentuates market distortion. Connecticut does not engage in this type of activity. In any event, Appellees' claims that beer prices are presently determined by market conditions are specious.

Appellees persist in asserting an erroneous economic analysis in claiming that the Connecticut affirmation statute removes indigenous competitive "advantages" from wholesalers in Connecticut's border states. The importers and brewers in compliance with extraterritorial beer statutes in other states determine prices to wholesalers. Free market economics have virtually nothing to do with actual prices.

In claiming that Connecticut's statute constitutes protectionism, Appellees turn Commerce Clause principles on their head. The Connecticut statute, contrary to Appellees' assertions, eliminates an arbitrary, artificial and permanent competitive disadvantage the Appellees would be able to impose on Connecticut wholesalers under their proposed interpretation of the Twenty-First Amendment. In contrast, Connecticut law simply harmonizes pricing between its wholesalers and counterparts in border states. It is the Connecticut statute which eliminates competitive disadvantages and price discrimination otherwise arbitrarily imposed on Connecticut wholesalers.

B. Appellees Lack Standing And Have Failed To Carry Their Burden Of Proof In Asserting Wholesalers' And Retailers' Speculative Grievances.

Appellees lack standing to make their misplaced protectionist claims. *See* Appellees Br. 23-33. Any theoretical "advantage" that may be surrendered as a result of the Connecticut statute belongs to hypothetical out-of-state wholesalers or control states. Moreover, wholesalers in unconcentrated markets such as Lake George, New York, would

clearly not normally have an indigenous advantage over those in a much more concentrated market such as Bridgeport, Connecticut. Connecticut has no in-state brewers or importers of beer who sell only within the state. The Connecticut statute therefore does not protect any in-state brewers or importers at the expense of out-of-state brewers or importers. The question of standing also extends to the actual operation of the national liquor distribution system and brings into question the motives of the brewers and importers.

In that there is a single source manufacturer or importer for each brand of beer, each brewer should only be concerned with market accessibility and ultimately penetration of his products into each state market. The ultimate sale, whether it occurs in Connecticut or its border states, is irrelevant to a brewer or importer provided his products have reached each state. There is no claim that Appellees have been prevented from accessing or penetrating the Connecticut or any other market as a result of the Connecticut statute. Rather, Appellees allege hypothetical injuries relating to alleged "competition" at the retail level. Appellees Br. 26-27.

In asserting Commerce Clause arguments on behalf of border state wholesalers and retailers, Appellees claim that the Connecticut statute interferes with retail prices in other states. Appellees, who arguably have no interest in retail competition, seem to in effect claim harms associated with interference of retail pricing. Appellees' interest in retail pricing and possible manipulation of retail pricing is suggestive of institutionalizing resale price maintenance on a state-by-state basis. Resale price maintenance and price discrimination, however, are clearly prohibited under the Sherman Act and federal anti-trust statutes. 15 U.S.C.S. Section 113 (1985); *See Schnapps Shops, Inc. v. H.W. Wright & Co.*, 377 F. Supp. 570 (D.C. Md. 1973). Appellees cannot have it both ways: either they are claiming injuries associated with promulgating arguably unlawful resale price maintenance pricing policies or they must restrict their Commerce Clause analysis to commerce at the manufacturer or importer to wholesaler level. There has

been no claim, however, that the Connecticut affirmation statute inhibits sales to wholesalers in any state.

Appellees moreover have not alleged any quantifiable economic injury resulting from the Connecticut statute. To this extent, Appellees ask this Court to engage in conjecture and speculation reminiscent of that unsuccessfully sought after in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). It is virtually inconceivable that in the course of this litigation, and litigation involving liquor affirmation nationwide, the Appellees have not introduced a scintilla of evidence demonstrating economic harm. Appellants urge this Court to reject Appellees' claims of protectionism in the absence of any harm other than alleged speculative injury to businesses and consumers not party to this action.

C. The Connecticut Statute Eliminates Competitive Disadvantages To Connecticut Wholesalers Which Appellees Erroneously Attribute To Market Conditions And Price Discounting Practices.

The Connecticut statute was legislated for the legitimate purpose of eliminating artificial discriminatory pricing by Appellees. Prices of beer have historically been higher in Connecticut than its border states. Appellees Br. 2. Despite Appellants' inquiries, Appellees have never been able to explain or justify why Appellees, both brewers and importers, set higher prices for sale to wholesalers in Connecticut than to its border states. It is apparent on its face that artificially higher prices in one state may serve to subsidize lower prices in another. Institutionalizing this scheme smacks of promoting the failed policies of centralized economic planning.

Appellees have suggested that lower prices in Connecticut's border states may be a function of volume discounting and/or inversely, Connecticut's own liquor regulations. Appellees Br. 4. Appellees' assertions that volume discounting exists in Connecticut's border states and may create

competitive advantages for wholesalers in those states are simply wrong. Volume discounting between brewers or importers and wholesalers does not exist in New York or in any other state with price posting laws in that the same FOB prices are charged by brewers to any wholesaler in a particular state regardless of the volume purchased. Moreover, Appellees have never introduced any evidence to suggest that such volume discounting practices exist. There may be quantity discounts, however, for single transactions, as distinguished from volume discounts, between wholesalers and retailers or retailers and consumers under New York's ABC liquor law.

Connecticut's regulation of liquor is hardly the most stringent in the four-state region at issue in this appeal. For example, New York law requires that prices be maintained for at least 180 days before prices can be increased. *See* Appellees Br. 19. This 180-day posting requirement is certainly more rigid than Connecticut's 30-day price posting regulation. Moreover, Courts have found that the New York 180-day pricing statute is in harmony with the Commerce Clause and does not constitute an antitrust violation in that it preserves competition. *Best Way Beer & Soda Distributors, Inc. v. N.Y. State Liquor Authority*, 99 App. Div. 2d 727 (1984). The less stringent 30-day posting requirement in Connecticut coupled with price affirmation was similarly enacted to achieve and ensure competition.

Despite Appellees' representations to the contrary, New York requires statewide pricing for the sale of beer to wholesalers. *See* N.Y. Alco. Bev. Cont. Law Section 55-b(2). As a result of statewide pricing and statewide territories, a statewide New York wholesaler may benefit from alleged volume discounting and sales of beer in another market within the state with no reference to the alleged indigenous market forces. As noted above, however, the statewide price and alleged volume discounting have no relation necessarily to the markets where a wholesaler ultimately may sell beer within the state.

For example, a New York City wholesaler buying 1,000,000 cases of beer may benefit from an alleged volume discount. In practice, however, there simply are no volume discounts. In theory, a volume discount should relate to volumes purchased in reliance on the concentration of the particular market. New York City wholesalers would presumably therefore benefit most from alleged volume discounts as a result of New York City's market concentration. However, a New York City wholesaler, benefitting from an alleged volume discount on 1,000,000 cases of beer, may then choose to sell 950,000 cases in New York City and ship the remaining 50,000 cases to another market, such as Lake George. In that the local price of beer in Lake George would otherwise be higher than that of beer in New York City, again as a function of market concentration, as a result of statewide wholesale pricing, beer is sold to wholesalers at an artificially low price for resale in Lake George. The 50,000 cases of beer distributed to Lake George were purchased at an alleged volume discount having no relation whatsoever to the actual market concentrations of Lake George. Enforcing such a pricing scheme, with no relation to true market forces, would place Connecticut wholesalers at a permanent and arbitrary economic disadvantage vis-a-vis their New York counterparts, particularly those in areas bordering New York State such as Bridgeport and Danbury who operate within 75 miles of New York City, arguably within the Metropolitan New York City Market. Connecticut legislates against this scheme by referencing prices in border states.

At issue before this Court is Connecticut's constitutionally prescribed powers to regulate beer and eliminate artificial price discrimination. Connecticut does not regulate prices in its border states; Appellees are free to set and change prices in those states at any time. The Connecticut statute, however, ensures that arbitrary and artificial price discrimination will not be permitted in Connecticut solely to subsidize lower prices elsewhere or allow Appellees to achieve their targeted profit margins at the expense of Connecticut wholesalers. In harmony with both the Commerce Clause and Twenty-First

Amendment, the State of Connecticut has exercised its constitutional authority in insisting that brewers and importers engage in competitive pricing as a prerequisite to engaging in commerce relating to beer within Connecticut.

CONCLUSION

The Twenty-First Amendment empowers Connecticut to regulate the price of liquor within its borders. The Twenty-First Amendment authorizes Connecticut to establish a competitive price for beer sold within its borders. The Connecticut statute does not regulate the price of beer beyond its borders.

The Connecticut Affirmation Statute is not protectionist because it ensures competition and economic parity for beer wholesalers. The Connecticut statute eliminates Appellees' artificial and arbitrary pricing of beer in the State of Connecticut. Appellees lack standing and have failed to carry their burden of proof in asserting speculative grievances. The Connecticut statute eliminates competitive disadvantages to Connecticut wholesalers which Appellees erroneously attribute to market conditions. The Connecticut affirmation statute harmonizes the Twenty-First Amendment and Commerce Clause of the U.S. Constitution.

For all the foregoing reasons, we respectfully request that the Court enter an order summarily reversing the decision of the United States Court of Appeals for the Second Circuit and affirming the judgment of the United States District Court for the District of Connecticut. In the alternative, if appropriate, we urge the Court to reverse the decision of the U.S. Court of Appeals for the Second Circuit and remand this case to the lower court on the sole issue of the constitutionality of Connecticut statute as applied.

Respectfully submitted,

Wine and Spirits Wholesalers of Connecticut, Inc.

WILLIAM A. WECHSLER
BAILEY AND WECHSLER
Counsel of Record
(A Member of the Bar of
the U.S. Supreme Court)

ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER

66 Forest Street
Hartford, CT 06105
Telephone: (203) 525-9191

February 28, 1989